

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Communications Assistance for Law)	ET Docket No. 04-295
Enforcement Act and Broadband Access)	
and Services)	
)	

COMMENTS OF EARTHLINK, INC.

EarthLink, Inc., by its attorneys and in response to the *First R&O and Further NPRM* in the above-captioned proceeding,¹ hereby files these comments regarding the application of the Communication Assistance for Law Enforcement Act (“CALEA”) requirements to IP-Enabled communications. EarthLink is among the largest independent broadband Internet Service Providers (“ISPs”) in the United States today. EarthLink provides Internet services to over 5.3 million customers, via both broadband and narrowband, including high-speed Internet access services, Voice over Internet Protocol (“VoIP”) services, and other IP-enabled services. EarthLink is sensitive to the needs of law enforcement and is committed to offering needed assistance to promote and protect public safety and national security.

INTRODUCTION AND SUMMARY

EarthLink fully supports the efforts of law enforcement and the Federal Communications Commission (“FCC” or “Commission”) under CALEA and is working

¹ *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, First Report and Order and Further Notice of Proposed Rulemaking*, FCC 05-153 (rel: Sept. 23, 2005)), *petitions for review pending*, COMPTTEL, et al v. FCC, No. 05-1408 (D.C. Cir. filed Oct. 25, 2005) (“*First R&O and Further NPRM*”).

diligently to achieve CALEA-compliance for its interconnected VoIP services by May 13, 2007, the compliance date.² While EarthLink recognizes the application of CALEA to interconnected VoIP providers as set forth in the *First R&O and Further NPRM*,³ these requirements should not be expanded to VoIP and IP-enabled services that are not interconnected, such as free services and one-way communications services. These additional VoIP services are information services under both the Communications Act and CALEA, do not meet CALEA's "substantial replacement provision," and thus there is no statutory basis for extending CALEA requirements to VoIP and IP-enabled service providers that do not provide an interconnected VoIP service.

I. CALEA Requirements Apply Only to "Telecommunications Carriers"

By its terms, CALEA applies only to "telecommunications carriers." Excluded from that term (and so from CALEA requirements) are providers of "information services."⁴ In the *First R&O and Further NPRM*, the FCC determined that "information services" under the Communications Act are not necessarily an "information services"

² EarthLink offers an interconnected VoIP service using a broadband connection (i.e., DSL or cable modem service) and will offer a line-powered voice ("LPV") services via connections purchased from Covad Communications. EarthLink also offers a third, non-interconnected VoIP service, "Vling." (described *infra*).

³ As defined in the FCC's VoIP E911 rules, "interconnected VoIP" are services that: "(1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN." *In the Matter of E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 10245, ¶¶ 3-8, 36-56 (2005), *petitions for review pending*, *VoicePulse, Inc. v. FCC*, No. 05-1247 (D.C. Cir. filed July 11, 2005) and *Nuvio Corp. v. FCC*, No. 05-1248 (D.C. Cir. filed July 11, 2005) ("*VoIP E911 Order*").

⁴ 47 U.S.C. § 1001(6) (Congress excludes "persons or entities insofar as they are engaged in providing information services" from the CALEA "telecommunications carrier" definition).

under CALEA.⁵ As such, certain services, such as cable modem services, may be “information services” under the Communications Act, but offered by a “telecommunications carrier” under CALEA.⁶

Pursuant to CALEA, a “telecommunications carrier” is defined as “a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire.”⁷ CALEA also provides, however, that the FCC shall deem a provider to be a “telecommunications carrier” even if it does not meet the definition of this term where the provider is “engaged in providing wire or electronic communications switching or transmission service;” offers a “service [that] is a replacement for a substantial portion of the local exchange service” and “it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of CALEA” – the so called “Substantial Replacement Provision.”⁸ According the *First R&O and Further NPRM*, a service is a substantial replacement when it replaces a significant function of traditional local exchange telephone service.⁹

⁵ See *First R&O and Further NPRM*, ¶¶ 15, 23 (“the treatment of information services under CALEA is different from the treatment such services have been afforded under the Communications Act”).

⁶ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd. 4798 (2002), *aff’d sub nom. National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005) (declaring that Title II and common carrier regulations, such as the *Computer Inquiry* rules, do not apply to cable modem service).

⁷ 47 U.S.C. § 1001(8)(A).

⁸ 47 U.S.C. § 1001(8)(B)(ii).

⁹ *First R&O and Further NPRM*, ¶ 12 (The substantial replacement provision “is triggered when a service replaces a portion of traditional telephone service, i.e., all or some of the components, or functions, of the service. Because the statutory phrase

As set forth by the FCC, services with the capability to make and receive ordinary PSTN voice calls from the view of the consumer fall outside the definition of CALEA “information service” exemption.¹⁰ As such, the FCC held that interconnected VoIP service providers are “telecommunications carriers” based on the substantial replacement provision and clarified that the service at issue merely must be capable of receiving and terminating calls on the PSTN; thus, all calls provided by interconnected VoIP providers are covered by CALEA regardless of whether a specific call is interconnected.¹¹

Pursuant to this ruling, therefore, unless the FCC finds that a service either falls directly under the definition of “telecommunications carrier” or the service meets the substantial replacement provision, CALEA obligations are inapplicable to the service in question. EarthLink urges the FCC to continue to ensure that CALEA obligations are not expanded to information services that are outside of the statute’s scope and that are not used nor viewed by consumers as replacements for traditional telephone service.

II. The FCC Should Define Additional VoIP Services As “Information Services”

VoIP services outside of the Commission’s interconnected VoIP definition are not services provided by a “telecommunications carrier” within the scope of the CALEA definition, are not a substantial replacement for traditional telephone services, are not viewed by consumers as replacements for telephone services, and thus are properly

includes the word ‘substantial,’ we will require the functions being replaced to be a significant or substantial function of traditional telephone service.”)

¹⁰ *Id.* ¶ 45.

¹¹ *Id.* ¶ 39. In applying the substantial replacement test, the FCC determined that interconnected VoIP “replaces the legacy POTS service functionality of traditional local telephone exchange service.” *Id.* ¶ 42. Further, the FCC determined that facilities-based broadband Internet access service replaced a substantial portion of the local telephone exchange service, specifically the portion used for dial-up Internet access. *Id.* ¶ 26.

classified as “information services.” As such, the FCC should recognize the statutory limitations of CALEA and refrain from applying these obligations on services that fall outside even the “Substantial Replacement Provision” of CALEA, as relied upon in the *First Report & Order and NPRM*.

For example, “Vling” is a service offered by EarthLink that provides as a feature of its instant messaging functions the ability for subscribers to contact another Vling subscriber or subscribers of similar services via a voice communication rather than by sending a typed message (as via traditional instant messaging). To use the service, Vling customers download the program from EarthLink’s website, and are assigned a non-North American Numbering Plan Administration (“NANPA”) number. Based upon its service specifics, the provision of the Vling service would not transform EarthLink into a “telecommunications carrier.” Likewise, Vling is not an interconnected VoIP service, nor is it a replacement for traditional local exchange service. For instance, end users cannot dial NANPA telephone numbers utilizing Vling, as such communications are unable to interconnect with the PSTN. Instead, end users can only communicate with other Vling end users or end users of other limited Session Initiated Protocol (“SIP”)-compatible services. Similarly, unlike traditional telephone services, Vling is free. As such, the FCC should find that Vling and other similar services that do not evidence the indicia of services contemplated by CALEA as those provided by “telecommunications carriers” and/or that do not in any way represent a substantial replacement for traditional local exchange service are outside of the scope of the CALEA obligations.

Additionally, in the *First R&O and Further NPRM*, the FCC sought comment on whether other “managed” VoIP services, a term proposed and used by law enforcement,

should be subject to CALEA.¹² Although the FCC declined to use the distinction between “managed” and “non-managed” VoIP services, instead utilizing the term “interconnected VoIP,” notably the FCC limited its further inquiry into whether CALEA requirements should be extended to “managed” VoIP services. EarthLink believes that for purposes of using these classifications for assessing additional VoIP services, “non-managed” VoIP services should be outside of CALEA obligations

With “managed” VoIP services, the VoIP provider is required to manage the communications between end points providing call set up, connection and termination, and party identification features.¹³ In contrast, “non-managed” services are “peer-to-peer” communications services in which the provider has little or no involvement and where the service is “set up and managed by the end user via its customer premises equipment or personal computer.”¹⁴ In light of the characteristics of services such as Vling, in which an end user must set-up the service via personal computer, can contact only other Vling subscribers or subscribers of similar services, and do not rely on EarthLink to manage the communication, the FCC should also find that non-managed services such as Vling are not appropriately subject to CALEA.

¹² *First R&O and Further NPRM*, ¶ 48.

¹³ *See In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, Notice of Proposed Rulemaking and Declaratory Ruling*, 13 FCC Rcd. 3149, ¶ 37 (2004) (“*Notice of Proposed Rulemaking*”).

¹⁴ *Id.*

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CONCLUSION

For the forgoing reasons, EarthLink urges the Commission not to extend CALEA requirements to non-interconnected VoIP services that are not substantial replacements for traditional telephone service and which are properly classified as information services outside of the scope of CALEA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sybil Anne Strimbu, state that copies of the foregoing *Comments of EarthLink, Inc.*, were submitted electronically, this day, Monday, November 14, 2005, to the following:

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